State of Michigan
Supreme Court

Appeal from the Michigan Court of Appeals
Owens, P.J., And Bandstra And Murray, J.J.

MICHIGAN DEPARTMENT OF TRANSPORTATION,
Plaintiff-Appellee,

v.

HAGGERTY CORRIDOR PARTNERS LIMITED PARTNERSHIP, PAUL D. YAGER, Trustee a/k/a PAUL D. YEGER AND NEIL J. SOSIN,
Defendants-Appellants.

Supreme Court
No. 124765

Court of Appeals
No. 234099

Oakland County
Circuit Court
No. 95 509518 CC

BRIEF OF DEFENDANTS-APPELLANTS HAGGERTY CORRIDOR PARTNERS LIMITED PARTNERSHIP, PAUL D. YAGER, Trustee a/k/a PAUL D. YEGER AND NEIL J. SOSIN

MARY MASSARON ROSS (P43885)
PLUNKETT & COONEY, P.C.
Appellate Counsel for Defendants-Appellants
535 GRISWOLD, SUITE 2400
DETROIT, MI 48226
(313) 983-4801

ALAN T. ACKERMAN (P10025)
DARIUS DYNKOWSKI (P52382)
ACKERMAN & ACKERMAN, P.C.
Attorneys for Defendants-Appellants
5700 CROOKS ROAD, SUITE 405
TROY, MI 48098
(248) 537-1155

BRIAN G. SHANNON (P23054)
MARK P. KRYSINSKI (P35630)
JAFFE, RAITT, HEUER & WEISS, P.C.
Co-Counsel for Defendants-Appellants
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MI 48228
(313) 961-8380

Becker Gallagher Legal Publishing, Inc.
Cincinnati, OH 800.890.5001

TABLE OF CONTENTS

Page

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

FEDERAL CASES

OUT-OF-STATE CASES

COURT RULES

STATUTES

CONSTITUTIONAL PROVISIONS

JURY INSTRUCTIONS

LEGAL TREATISES AND TEXTS

LAW REVIEW MATERIAL

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

In this condemnation action, judgment was entered in favor of the defendants and against the Michigan Department of Transportation after the jury returned a verdict awarding the defendants $14,877,000 as just compensation for a parcel of property that was condemned for use in the M-5 highway construction, also known as the M-5 Haggerty Connector. (Tr, 4/2/01, p 26; Apx 194a). The Michigan Department of Transportation appealed as a matter of right from the judgment. The Court of Appeals issued a decision affirming in part and reversing in part and remanding for further proceedings. Defendants-appellants timely sought leave to appeal to this Court. This Court granted the application, limited to the issues of (1) whether a post-taking zoning decision can be considered in determining the value at the time of the taking; and. (2) whether the Court of Appeals decision in this case is consistent with *Dep't of Transportation v Van Elslander*, 460 Mich 127; 594 NW2d 841 (1999).

This Court has jurisdiction pursuant to MCR 7.301 because it granted the application for leave to appeal that was timely filed by the defendants-appellants. (Order, 6/11/04; Apx 554a).

STATEMENT OF THE QUESTIONS PRESENTED

I.

MAY A POST-TAKING ZONING DECISION BE CONSIDERED IN DETERMINING THE VALUE OF CONDEMNED PROPERTY AT THE TIME OF THE TAKING?

Haggerty Corridor Partners Limited Partnership, Paul D. Yager, Trustee a/k/a Paul D. Yeger and Neil J. Sosin answer "Yes."

The Michigan Department of Transportation answers "No."

The trial court answers "Yes."

The Court of Appeals answers "No."

II.

DID THE COURT OF APPEALS ERR BECAUSE *MDOT v VAN ELSLANDER* REQUIRED IT TO DEFER TO THE TRIAL COURT'S RULING ADMITTING EVIDENCE OF A REASONABLE POSSIBILITY OF REZONING WHERE SUCH EVIDENCE WAS RELEVANT TO THE VALUE ON THE DATE OF THE TAKING AND, IN ANY EVENT, ANY ERROR WAS NOT INCONSISTENT WITH SUBSTANTIAL JUSTICE?

Haggerty Corridor Partners Limited Partnership, Paul D. Yager, Trustee a/k/a Paul D. Yeger and Neil J. Sosin answer "Yes."

The Michigan Department of Transportation answers "No."

The trial court presumably answers "Yes."

The Court of Appeals answers "No."

STATEMENT OF FACTS

A. Nature Of The Action.

The Michigan Department of Transportation initiated this eminent domain proceeding on December 7, 1995 to condemn property in the City of Novi for construction of the M-5 Haggerty connector. (Complaint, 12/7/95; Apx 24a). Before the taking, the property owner[1] had assembled about three hundred and thirty-five acres of vacant land immediately west of Haggerty, from Twelve Mile Road north past Thirteen Mile Road. It was assembled to build a high technology office park. (Tr, 4/5/01, Sosin, pp 64-80; Apx 355a-359a). At the time of the taking, the property was zoned for single-family homes on one-acre lots along with other permitted agricultural uses. (Tr, 4/2/01, Rogers, pp 94-96; Apx 211a). After MDOT condemned approximately fifty-one acres, the property owner developed an office park on the remainder, which had been rezoned. These changes to the property's zoning, in fact, occurred as the property owner had anticipated before assembling the property. (Tr, 4/2/01, Doozan, p 252; Apx 250a; Tr, 4/6/01, Fuller, p 51; Apx 200a; Tr, 4/5/01, Sosin, pp 68-70, 96; Apx 428a, 435a).

In determining just compensation, the jury had to take into consideration the property's value under its "highest and best use" in 1995. (Tr, 4/9/01, pp 138-140; Apx 489a). The property owner and MDOT had widely divergent numbers stemming from their fundamentally different views of highest and best use. Besides viewing the site, the jury listened to public officials (Tr, 4/5/01, Quinn, pp 7-22; Apx 341a-345a; Tr, 4/5/01, Kriewall, pp 24-46; Apx 345a-351a) reviewed public records describing rezoning prospects in Novi in 1995, (Defendants'

---

[1]For ease of reference, Haggerty Corridor Partners Limited Partnership, Paul D. Yager, Trustee a/k/a Paul D. Yeger and Neil J. Sosin will be referred to as "the property owner," a reference that will include all defendants. The Michigan Department of Transportation will be referred to as "MDOT."

Exhibit K; Apx 503a; Defendants' Exhibit KK; Apx 556a; Defendants' Exhibit GGG; Apx 525a; Defendants' Exhibit YY; Apx 521a) and heard from land use experts and appraisers. (Tr, 4/2/01, Rogers, pp 78-193; Apx 207a-236a; Tr, 4/3/01, Wieme, pp 176-258; Apx 298a-319a; Tr, 4/6/01, Carlysle, pp 12-16; Apx 414a-415a). The jury also heard expert testimony about the economic feasibility of the parties' proposed uses. (Tr, 4/6/01, Fuller, pp 58-63; Apx 426a-427a). The jury properly learned that the long-discussed zoning changes had occurred. This evidence corroborated the appraiser's determination that value should be based on the highest and best use, which was office/tech development, and impeached testimony and argument from MDOT that there was no possibility of a change in zoning. (Tr, 4/2/01, Rogers, pp 166-167; Apx 229a; Tr, 4/5/01, Sosin, p 96; Apx 435a). The jury's verdict shows that it agreed with the property owner's witnesses that the market for this property in 1995 would have recognized the likelihood of rezoning in the reasonably near future so that it could be developed for office/high-tech use. (Tr, 4/9/01, p 155; Apx 493a).

Over a strong dissent, the Court of Appeals reversed the judgment and remanded for a new trial. (Court of Appeals Nos. 234099; 240277, 7/22/03; Apx 544a). This Court granted leave to appeal limited to the issues (1) whether a post-taking zoning decision can be considered in determining value at the time of the taking; and (2) whether the Court of Appeals decision in this case is consistent with *Dep't of Transportation v Van Elslander*, 460 Mich 127; 594 NW2d 841 (1999). (Order, 6/11/04; Apx 554a).

B. The History Of The Property, Its Zoning, And Development.

The disputed property is a long strip of land lying west of Haggerty Road, north of Twelve Mile Road, and south of Fourteen Mile Road. (Tr, 4/3/01, Carlysle, p 272; Apx 322a). It is bisected by Thirteen Mile Road and, lengthways, by a corridor through which Detroit Edison runs high-tension transmission lines. Before the taking, the property owner owned about

three hundred and thirty-five acres, of which about 51.26 acres were taken. (Tr, 4/3/01, Carlysle, pp 272, 300; Apx 322a, 329a; Tr, 4/6/01, Fuller, p 66; Apx 428a).[2] As late as 1995, Section 300 of the City of Novi's zoning ordinance read, "The R-A Residential/Agriculture districts are intended to provide areas within the community for Agriculture uses until such time as the land may be eventually developed in other uses pending proper provision of utilities, transportation to other facilities, and to provide for a particular living environment characterized by large lot low density single family dwellings." (Tr, 4/2/01, Rogers, pp 143-149; Apx 223a-225a; Defendants' Exhibit YY; Apx 521a). Although this designation was later changed to remove references to agricultural uses and the explicit statement that the district was intended to be a holding zone, knowledgeable participants in the commercial real estate market knew that the property's zoning classification would change as growth pushed development into the area.[3] In December, 1995, at the time of the taking, the property was zoned R-A, meaning Residential/Acreage,[4] or single-family homes on one-acre lots. (Tr, 4/2/01, Rogers, pp 94-95; Apx 211a). This was a holding

---

[2]The property owner acquired additional land north and south of Thirteen Mile Road after the taking to provide necessary replacement access to Thirteen Mile and mitigate damages. The property owner's appraiser dealt with that land in his testimony. (Tr, 4/6/01, pp 157-158; Apx 451a).

[3]Although he refused to use the term "holding zone," City planner and MDOT "expert," Rogers conceded as much when he said, "It gives an inference that the land may be reclassified if, as and when, water and sewer and transportation facilities come in." (Tr, 4/2/01, Rogers, p 146; Apx 224a). City manager Kriewall readily agreed that the R-A zoning was intended to be a holding zone until utilities, transportation, and other services came in. (Tr, 4/5/01, p 27; Apx 346a).

[4]The ordinance in effect at the time of the taking read:

> The RA Residential Acreage Districts are intended to provide areas within the community for a particular living environment characterized by large lot, low density, single-family dwellings.

(Defendants' Exhibit PP; Apx 519a).

classification,[5] which would be changed when utilities and other services were brought to the area. (Tr, 4/5/01, Kriewall, p 27; Apx 346a; Tr, 4/5/01, Sosin, p 70; Apx 357a; Tr, 4/2/01, Rogers, p 148; Apx 224a).

Neil Sosin, the property owner, had been involved in real estate development for many years. (Tr, 4/5/01, Sosin, pp 62-63; Apx 355a). At one time, the property owner's focus was on apartment developments. (Tr, 4/5/01, Sosin, p 63; Apx 355a). In the 1980s, because of changes in the tax laws, the property owner started to change direction "into the office, high-tech, industrial type of business." (Tr, 4/5/01, p 63; Apx 355a). Around that time, the Farmington Hills Country Club decided to build a new clubhouse. (Tr, 4/5/01, Sosin, p 63; Apx 355a). To acquire funds to do so, the country club sold its golf course to the property owner in this action. (*Id.*) Sosin and others acquired a one hundred and fifty acre parcel, which was located near Twelve Mile and Haggerty Road. (*Id.*) They developed a Nissan headquarters and also the world headquarters of the American Concrete Institute on the property. (Tr, 4/5/01, pp 64-65; Apx 355a-356a). Nissan located a three hundred and fifty thousand square foot research and development facility there. (*Id.*) According to the property owner, "they did car styling there and testing of the facilities, it was very high tech...." (*Id.*) The property owner "continued to develop there, we had a lot of activity in the Farmington Hills area...." (*Id.*, p 65; Apx 356a).

These developments went well and so the property owner "looked to the land kiddy-corner to us, which was the Haggerty property we spoke of, and it's part of what we're discussing today, and saw that there was a great opportunity to do what we did in Farmington Hills kiddy-corner in Novi." (*Id.* p 65; Apx 356a). This would require zoning for office/high

---

[5](Exhibit YY at 28; Apx 521a; Tr, 4/2/01, Rogers, p 148; Apx 224a). This zoning had been changed earlier in 1995 to emphasize that one of the uses permitted was low-density single family residential. (Tr, 4/2/01, Rogers, pp 95-96; Apx 211a). The title was altered from residential/agricultural to residential/acreage. (*Id.*)

tech development so the property owner investigated the likelihood of a change in zoning before purchasing the property. (Tr, 4/5/01, p 66; Apx 356a).

The property owner assembled this property in Novi from 1988 through the early 1990s to develop a high-tech office park. (Tr, 4/5/01, Sosin, pp 62, 64-65; Apx 355a-356a). The property owner was not a residential subdivision developer and had no plans to develop this site under its pre-1998 zoning. (*Id.*) Like most real estate developers, the property owner did "homework on the property." (Tr, 4/5/01, Sosin, p 68; Apx 356a). The property owner investigated the uses of the property, the soil conditions, the woodlands, the wetlands, the topography, and other aspects of the property before buying it. (*Id.*) A part of this due diligence process was to meet with officials from the City. (Tr, 4/5/01, Sosin, pp 69-71; Apx 357a). The property owner spoke with them about their plans for the area. (Tr, 4/5/01, pp 68-70; Apx 356a-357a).

Both Novi and the property owner believed that the property would soon be rezoned to allow development of a high-tech office/industrial park. Greg Capote, Novi's Economic Development Coordinator, testified that the property was not suitable for single-family development (Tr, 4/5/01, p 271; Apx 407a),[6] and added that the City was not at all interested in new multi-family development, anywhere in Novi. (*Id.*, p 272; Apx 407a). Capote acknowledged that in the mid-1990s economic conditions were "right to bring in high-tech [development] in the town." (Tr, 4/5/01, Capote, p 268; Apx 406a). A similar zoning ordinance, the OS-2/PD-4 classification, existed in 1995 but getting approval for projects under OS-2/PD-4

[6]Capote pointed out that, among other things, the Detroit Edison high-tension power lines made the property unsuitable for residential development. (Tr, 4/5/01, pp 231-232; Apx 397a; Tr, 4/3/01, Carlysle, pp 320-321; Apx 334a).

was "cumbersome." (Tr, 4/5/01, Capote, p 263; Apx 405a).[7] As a result, despite a market demand for office parks in Novi, and despite the City's desire to shift some of the tax burden from homeowners to businesses, the OS-2/PD-4 classification was not being used. (Tr, 4/5/01, Quinn, p 13; Apx 343a; Tr, 4/5/01, Capote, pp 263-265; Apx 405a).

In 1992 or 1993, Matthew Quinn, Novi's then-mayor, told the property owner and a National Bank of Detroit representative that the City would be willing to rezone part of the property for an office campus to house NBD's headquarters. (Tr, 4/5/01, Quinn, p 11-12; Apx 342a). Edward Kriewall, then-city manager and also present at that meeting, agreed that Novi would consider a zoning change. (Tr, 4/5/01, Kriewall, pp 27, 31; Apx 346a). The property owner gave the same account of the meeting. (Tr, 4/5/01, Sosin, pp 72-73; Apx 357a).

Capote believed as early as 1994 that large assembled tracts of land with water, sewer, and utilities were "necessary to bring high-tech, large corporate campus-type developments" to Novi. (*Id.*, p 269; Apx 407a). By 1995, city officials "absolutely were interested in high-tech companies" locating in Novi. (*Id.*, 272; Apx 407a). Steps to facilitate this kind of development were already under way before the taking. Six months before the taking (in June 1995), the Planning Commission considered adopting a new zoning classification, OS-3, which Capote recognized was "essentially the same" as the office/service/technology ("OST") zoning classification later adopted. (Tr, 4/6/01, Fuller, p 44; Apx 422a; Capote, Tr, 4/5/01, p 267; Apx 406a). This OS-3 classification was not accepted by the Planning Commission, (Tr, 4/6/01, Fuller, pp 50-51; Apx 424a), but at that same time the planning director told the Planning

---

[7] OS/2/PD/4 was a planned unit development classification, which required extensive site plan review. A related zoning classification for light industrial use (I-1), similar to OST, was also in effect in Novi at the time of the taking. (Tr, 4/5/01, Biehl, p 175; Apx 383a).

Commission that the matter of changing zoning to allow for high-tech development needed to be dealt with soon. (*Id.*) (See also Tr, 4/2/01, Rogers, pp 165-172, 181-183; Apx 229a-230a, 233a).

In June 1995, Novi's then-planning director, James Wahl, pointed out the need for zoning to accommodate high-tech office development, the City's efforts to achieve it for the past eight years, and how imperative it was to get that done. (Tr, 4/5/01, Kriewall, p 30; Apx 347a; Tr, 4/5/01, Capote, pp 262-263, 268; Apx 405a; Tr, 4/6/01, Fuller, pp 51-52; Apx 424a). Not only were city officials interested in facilitating high tech and office development, but discussions were under way to change the zoning ordinance to facilitate this kind of development. The OST zoning classification was developed to streamline the process for getting a development approved. (Tr, 4/6/01, Fuller, pp 65, 160; Apx 428a, 451a; Tr, 4/5/01, Capote, pp 263-266; Apx 405a-406a). The OST ordinance proposal had been under discussion for a "number of years" before it was finally approved in 1996. (Tr, 4/5/01, Kriewall, p 46; Apx 351a).

The business community also supported changes in the zoning. The Chamber of Commerce prepared a report highlighting the City of Novi's need for non-residential development. (Tr, 4/5/01, Kriewall, pp 28-30; Apx 346a). This was a key event that underscored the likelihood of zoning changes in the mind of any market buyer or seller. Contributors to the report included representatives from the City of Novi Planning Commission, Detroit Edison, the City of Novi's planning department, the Mayor, and the city manager. (Tr, 4/5/01, Kriewall, p 29; Apx 347a; Defendants' Exhibit K; Apx 503a). The report, prepared by the Chamber's Economic Development Committee, emphasized that new business development creates a stronger tax base. (Defendants' Exhibit K, p 2; Apx 504a). The report analyzed data showing that residential development brings substantial burdens due to the need for increased services and infrastructure. (*Id.*, p 6; Apx 508a). At the same time, the report warned that "Novi's significant zoning restrictions and requirements have proven to be a substantial

impediment to the development of existing industrial-zoned land causing a fall-off in non-residential development. (*Id.*, pp 8-9; Apx 510a). The Chamber proposed that, in the future, Novi should strive to combine different types of zoning and development to produce a balanced community. (*Id.*, p 13; Apx 514a). According to the City Manager, this report, issued only four months before the taking, "was intended to portray that Novi really needed to move more into the direction of nonresidential development" in order to relieve the tax burden on homeowners. (Tr, 4/5/01, Kriewall, p 30; Apx 347a).

Capote was already involved in the planning for an OST zoning district to accommodate that kind of development in December 1995, the month of the taking. (*Id.*, p 261; Apx 405a). After notice and public hearings earlier in 1996, the OST zoning classification was adopted by Novi in December 1996. (Tr, 4/6/01, Fuller, p 51; Apx 424a). As the City officials had originally promised Sosin and NBD, Novi's former planning consultant, Brandon Rogers, on behalf of the City proposed rezoning the property owner's parcel to the OST classification in January 1998, a mere twenty-five months after the taking. (Tr, 4/2/01, Rogers, p 114; Apx 216a). In May 1998, only four months after the classification was adopted, the city-initiated proposal to rezone the property owner's parcel to OST, along with some 1150 acres of other property in Novi, was adopted. (*Id.*, pp 166-167; Apx 229a). By the time of trial, development of the property owner's high-tech office park was well underway. (Tr, 4/2/01, Doozan, p 230; Apx 245a).

C. The Character Of The Pleadings And Proceedings.

MDOT's "good faith offer"[8] for the property was $2,758,000, based on a pre-taking

---

[8]Under MCL 213.55, condemning authorities must make a good faith offer for condemned property at the time of taking.

appraisal. When this was not accepted, MDOT commenced condemnation proceedings by filing a complaint. (Complaint, 12/7/95; Apx 24a).

At trial, the parties hotly disputed the best and highest use for the property, the reasonable possibility of rezoning, and the costs to cure that would be born by the property owner to develop the remaining portion of its property.

The property owner's expert, James Fuller, valued the property based on the potential for a high-tech office-type development as the highest and best use. (Tr, 4/6/01, Fuller, pp 64-65; Apx 427a).[9] Fuller concluded that the property could not feasibly be developed for single family residential use. (Tr, 4/6/01, Fuller, pp 52-63; Apx 424a-427a). Fuller pointed out that, if it is not feasible to develop property as it is zoned, the confiscation principle comes into play and property owners seek rezoning from the local government for another use.. (Tr, 4/6/01, Fuller, pp 63-64; Apx 427a). The property owner's expert testimony established that "R-A" single-family residential development on the property was not economically feasible. When no development under a zoning classification is feasible, the local government must agree to rezoning or face liability for inverse condemnation. (Tr, 4/6/01, Fuller, p 64; Apx 427a; Tr, 4/2/01, Doozan, pp 239-240; Apx 247a). The one-acre lot minimums of R-A zoning (Tr, 4/3/01,

---

[9]MDOT sought to exclude Fuller's appraisal report, highest and best use and possibility of rezoning analysis, and the 1998 zoning change. (MDOT's Motion in Limine, 3/6/01; Apx 43a). MDOT argued that there was "no" concrete evidence, on the date of acquisition, that the property "would be rezoned." (*Id.*, p 9; Apx 51a). MDOT characterized the possibility of rezoning as speculative and insisted that the jury should not be permitted to consider testimony that the highest and best use was office/high tech development based on the possibility of rezoning. (*Id.*, p 26; Apx 68a). The property owner disagreed, pointing out that MDOT's position was undercut by trends of the past decade in Novi and in neighboring communities and was contradicted by the actual change in the property's zoning within a relatively short period after the zoning. (Defendants' Brief, 6/13/01, pp 2-3; Apx 71a). The trial court denied MDOT's motion because the evidence was relevant, not too remote in time, and its value was more probative than prejudicial. (Opinion and Order, 3/29/01, p 5; Apx 146a). The court found a factual dispute as to whether the rezoning was a reasonable possibility requiring the evidence to be submitted to the jury for a factual determination. (*Id.*)

Rose, p 17; Apx 259a) compounded the difficulty of profitably developing a single-family residential subdivision.[10] Under the property owner's experts' conservative calculations of development costs and expected sales proceeds, a hypothetical developer could expect to realize $5 million less than the absolute minimum it needed to justify investing in the project. (Tr, 4/6/01, Fuller, pp 53-54, 59-61; Apx 425a, 426a-427a; see also Tr, 4/5/01, Biehl, p 145; Apx 376a).

Because development under current zoning was not feasible, Fuller evaluated other potential uses. (Tr, 4/6/01, Fuller, p 64; Apx 355a). Fuller determined that the highest and best use was office/tech.[11] (*Id.*, p 65; Apx 356a). Using comparable sales of similarly developed properties, Fuller concluded that owner's property had a value on the date of taking that ranged up to $192,500 per acre. (*Id.*, p 71; Apx 357a). The value was based on development of the property under a zoning classification that would allow for office/service/technology uses. (*Id.*, pp 44-65; Apx 422a-428a). To account for the minimal risk that the property might not be rezoned, Fuller reduced his appraisal to $180,000 per acre. (*Id.*). This reduction was more than Fuller thought necessary to reflect the zoning risk. As he testified, "I think that in thirty-two years that I've been in this business, I've never been more confident that a property was going to be rezoned." (*Id.*, p 144; Apx 447a). On the basis of that reduced figure, he determined the before-take value of the property to be $57.3 million. (*Id.*, pp 78, 80; Apx 431a).

---

[10]Holding zones, if not rezoned on request, are often attacked as a regulatory taking because they "hold" the land in a zone under which development is difficult because of the approaching growth and development. (Tr, 4/6/01, Fuller, pp 63-64; Apx 427a; Tr, 4/2/01, Doozan, pp 239-240; Apx 247a).

[11]Richard Carlysle, a professional planner who has worked for many municipalities, testified that the highest and best use of the property on the date of taking was for high-tech corporate office use. (Tr, 4/3/01, p 296; Apx 328a).

Fuller determined that the after-take value of the remainder, without taking into account the $1.8 million cost of bringing sewer and water to the property, was $40,470,000. (*Id.*, p 88; Apx 433a). With the sewer and water costs deducted, the after value is $38,648,250, or about $38.7 million. The difference between $57.3 million and $38.7 million is the $18.6 million the jury was permitted to consider awarding as total damages for the property taken plus the costs to cure. The jury awarded $14.877 million, significantly less than the property owner requested. MDOT has paid $2.76 million of this amount.

Fuller's "after" value, despite MDOT's assertions, was not simply his "before" value less the costs to cure. Fuller opined that a potential buyer after the taking would have paid less than a before-minus-cures price, because of uncertainties inherent in a pre-development purchase. Accordingly, the "as is" after value of $38.7 million was some $2½ million less than a simple before-minus-cures price would have been. (Tr, 4/6/01, Fuller, pp 88; Apx 433a). Moreover, the property owner did not ask the jury to award damages for the cost of developing the property, but only for the increase in the cost of certain required improvements attributable directly to MDOT's project.

MDOT's expert, Christopher Doozan, submitted a report asserting that there was no possibility the City would waver from its R-A zoning of the property. But he admitted at trial that before completing his report, he learned that the City had actually rezoned the property to OST. That fact was omitted from his report. (Tr, 4/2/01, Doozan, p 222; Apx 395a). Brandon Rogers, a former planning consultant for Novi and used by MDOT as a planning expert at trial, insisted there was "no chance" that he would have recommended rezoning of the property. (Tr, 4/2/01, Rogers, p 193; Apx 236a). But he admitted that his zoning recommendations to the City Council were only followed some of the time; and he conceded that he had testified during his

deposition that there was a thirty percent probability[12] the property would have been rezoned for the right project. (*Id.*, pp 184, 191, 196; Apx 233a, 235a, 236a). Rogers did not explain why he would not have regarded owner's high-tech office park as the "right" project for the property. On cross-examination, Rogers admitted that two years before the taking in this case, neighboring property on the south side of Twelve Mile Road was rezoned from R-A to non-residential uses such as a bank and a gas station. (Tr, 4/2/01, pp 131-132; Apx 220a).

MDOT's appraiser, Donald Wieme offered a new appraisal that was significantly lower than MDOT's pre-taking appraisal, pegging just compensation at only $1,415,000. (Tr, 4/3/01, Wieme, p 206; Apx 47a). MDOT's claim of economically viable residential development was undercut by its own appraiser.[13] MDOT estimated that developed lots could sell for $95,000 apiece. (Tr, 4/3/01, Wieme, p 189; Apx 302a). Considered in conjunction with the per-lot development costs of $87,344.28 calculated by owner's expert (Tr, 4/5/01, Biehl, p 145; Apx 376a), this demonstrated that even if the land itself were free to the developer, it would have been impossible to realize the twenty-five percent profit that MDOT's appraiser insisted (Tr, 4/3/01, Wieme, p 186; Apx 301a) was necessary to make the project economically viable. (Tr, 4/6/01, Fuller, pp 58-62; Apx 426a-427a). Based on MDOT's own dollar estimates for lot acquisition costs, development costs, and sale prices for developed residential lots, MDOT's appraiser, Wieme admitted that a developer would have realized only a paltry 5.81% rate of

---

[12]The standard for admissibility of evidence concerning a likelihood of rezoning under Michigan law is only a reasonable possibility. *Dep't of Transportation v Van Elslander*, 460 Mich 127; 594 NW2d 841 (1999).

[13]While MDOT did not value the property based on a non-residential highest and best use, its experts assumed such a use in opining on cost-to-cure damages to the remainder. (See Tr, 4/3/01, Rose, pp 38-73; Apx 254a-273a). Significantly, MDOT's cost-to-cure analysis was based on the property owner's own layout of the property for a commercial development.

return (Tr, 4/3/01, pp 230-232; Apx 312a), no more than banks were offering at the time-but without the risk. (*Id.*, p 232; Apx 312a).

At MDOT's request (Plaintiff's Motion for Jury View), the jury saw the property in its post-taking state. The record shows that the trial judge rode with the jury on the bus and later described the route:

> [W]e got on the bus at about one o'clock, we went on the route starting at Fourteen Mile and Haggerty. We started to . . . tell you the-which way to look and what the subject property was. We went around to Twelve Mile to the route—the service road that cut through to Thirteen Mile [i.e., Owner's collector road from Twelve to Thirteen Mile, the developed part of the property, see Tr, 3/30/01, p 120], we went left on Thirteen Mile to the Haggerty Connector, we went north to Fourteen Mile and made a right turn, and then to Haggerty again.

(Tr, 3/30/01, p 139; Apx 181a). The jury's trip along the property owner's collector road from Twelve to Thirteen Mile took it right through the heart of Owner's property, what Biehl testified was the "developed" portion (Tr, 4/5/01, p 235; Apx 398a), with new office buildings on both sides of the road. Only the portion of the property north of Thirteen Mile was undeveloped at the time of the jury view. (*Id.*).

In closing, MDOT's counsel told the jury that MDOT would generously stick with the higher pre-taking appraisal number, even though the lower number was more accurate. (Tr, 4/9/01, p 73; Apx 473a). MDOT "bet the farm" that the jury would agree a large-lot, single-family development was the highest and best use. It offered no expert testimony whatever valuing the property based on a non-residential highest and best use. (Tr, 4/3/01, Wieme, p 239; Apx 314a).

The jury found just compensation owing in the amount of $14,877,000. (Tr, 4/9/01, p 155; Apx 493a).

D. The Court Of Appeals Decision.

MDOT timely appealed. After briefing and oral argument, the Court of Appeals issued a per curiam decision, which affirmed in part and reversed in part the judgment in favor of the property owner. The Court of Appeals held that the trial court abused its discretion in admitting evidence that the property was, in fact, rezoned in May 1998, approximately two and one-half years after the date of the taking. (Court of Appeals slip op, p 3; Apx 546a). The Court rejected the property owner's contention that this was not error, and if error at all, harmless. As a result, the Court reversed the judgment and remanded for further proceedings. The Court also addressed other evidentiary issues that are not the subject of this appeal and beyond the scope of this Court's limited grant of leave.

Judge Murray dissented on the basis that the trial court did not abuse its discretion. First Judge Murray concluded that the trial court properly applied the rules of evidence to admit evidence of the rezoning. According to Judge Murray, "any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant, *including the possibility of rezoning*." (Opinion, p 2; Apx 545a). Judge Murray relied on *State Highway Comm v Eilender*, 362 Mich 697; 108 NW2d 755 (1961) and *Dep't of Transportation v Van Elslander*, 460 Mich 127; 594 NW2d 841 (1999) for the proposition that if there is a reasonable possibility of rezoning, "this possibility should be considered by the factfinder in arriving at the proper value." (*Id.*, p 2; Apx 545a). He explained that this evidence had the tendency to make the existence of the possibility of rezoning more probable than it would be without the evidence. In addition, he reasoned that no Michigan decisional authority had ever held that the admission of such evidence was an abuse of discretion while respected authority such as Nichols treatise on eminent domain favors it. Thus, in Judge Murray's view, a ruling allowing it into evidence could not be an abuse of discretion. Finally, Judge Murray concluded that, even if the admission

of the evidence was an abuse of discretion, it was harmless error in light of the jury instructions and other competent, admissible evidence that allowed the jury to conclude that rezoning was a reasonable possibility. (*Id.*, pp 2-3; Apx 545a-546a).

SUMMARY OF THE ARGUMENT

This Court should squarely hold that a trial court may admit evidence of post-taking zoning decisions after a condemnation where, as here, the jury has been properly instructed and the evidence is relevant to the material question of whether a rezoning was reasonably possible at the time of the taking. An owner receives just compensation only if the owner receives the value of the property taken at the time of the taking. Here, that value depended largely on whether rezoning was reasonably possible at the time of the taking. Post-taking zoning decisions are relevant to corroborate the claim that on the date of the taking, the parties to a voluntary sale would have recognized and been influenced by the reasonable possibility of a change in zoning in the near future in fixing a selling price. *Roach v Newton Redevelopment Authority*, 301 Mass 135; 407 NE2d 1251, 1254; 381 Mass 135 (1980). Owners of investment properties rely upon the courts to ensure that any valuation takes into account the possibility of upzoning, a possibility that dramatically increases the value of the property. The government likewise relies on the courts to ensure that property is not overvalued because of a realistic possibility of downzoning. The Court of Appeals erred in ruling that evidence of post-taking zoning decisions is not relevant.

This question arose less frequently in the past when most condemnations in Michigan occurred under the traditional slow-take statute. Prior to 1980 when the Uniform Condemnation Procedures Act was adopted, those procedures meant that the valuation date was typically the date of trial. As a result, post-taking zoning decisions were also post-judgment zoning decisions and were not considered. But with the advent of the quick-take procedures, the gap between the date of taking and the date of trial increased. Relevant evidence of post-taking zoning decisions was therefore more frequently available to assist the jury with its determination of property value and to refute arguments by one side or the other that there was no possibility of a zoning change.

The property at issue here was zoned large-lot residential, a traditionally used "holding" zone often employed at the edges of developed areas until the municipality is ready to determine a final zoning and extend appropriate services to the property. See generally Eric M Braun, *Smart Growth in North Carolina: Something Old or Something New?*, 35 Wake Forest L R 707, 711 (2000) ("municipalities began using agricultural-type or rural/residential-type designations as 'holding' zones for future development . . . [to apply] to land located on the urban fringes of a municipality"); Henry R Richmond, *Does Oregon's Land Use Program Provide Enough Desirable Land To Attract Needed Industry to Oregon?,* 14 Envtl L 693, 703 (1984) (discussing state bill that would require land inside urban growth boundaries to be available for development unless specifically designated as non-urban "holding zone"); *Little v Winborn*, 518 NW2d 384, 388 (Iowa Sup, 1994) (agricultural district intended to act as "holding zone" until compatible urban proposal is approved). Typically, such classifications are temporary, changing when the municipality determines the appropriate classification for the more intensive development that follows in the wake of growth. Property owners, especially those who purchase or sell for commercial investment or building purposes, value such properties precisely because the zoning is likely to change as growth reaches the property.

The property owner in this case assembled property to develop a high-tech office/industrial park. (Tr, 4/5/01, Sosin, pp 62-65; Apx 355a-356a). Although the property was not zoned for this use on the date of taking, numerous signs suggested that a zoning change was imminent. Thus, knowledgeable and willing buyers and sellers would have agreed upon a price on the basis of this likelihood. Despite this, MDOT elicited testimony from its witness, Novi's city planner, Brandon Rogers, that there was no chance that he would recommend rezoning this property on the date of the taking. (Tr, 4/2/01, Rogers, p 191; Apx 235a). MDOT also asked Christopher Doozan, a planner, whether there was any possibility of the property being rezoned

to a more intense use. (Tr, 4/2/01, Doozan, p 208; Apx 239a). According to Doozan, the City would not have rezoned the property. (Tr, 4/2/01, Doozan, p 208; Apx 239a). MDOT's theme at trial, as seen in its opening statement, was that a "zoning change to OST, that would allow the Haggerty Partners to get the millions of dollars I think they'll be seeking, was speculative—not a possibility, but merely speculative." (Tr, 3/30/01, p 112; Apx 174a).

In the face of argument and testimony from MDOT witnesses that a zoning change was not reasonably possible, the property owner presented a retrospective appraisal that concluded that the value on the date of taking ranged up to $192,500 per acre. (Tr, 4/6/01, Fuller, p 71; Apx 429a). The appraiser reduced this figure to $180,000 per acre to take into account the minimal risk that the property might not be rezoned and any delay in the rezoning. (*Id.*) The after-taking zoning change corroborated the property owner's evidence that the zoning change was reasonably possible. It was, therefore, relevant.

The trial court's ruling allowing reference to the after-taking zoning change was not an abuse of discretion. *Dep't of Transportation v Van Elslander*, 460 Mich at 128-129. As *Van Elslander* requires, the trial court allowed the admission of this evidence because it supported the property owner's position that there was a reasonable possibility of rezoning and impeached testimony from MDOT's witness that there was no possibility of a change. Thus, the Court of Appeals reversibly erred in ruling that admission of the evidence was an abuse of the trial court's discretion and remanding for a new trial.

ARGUMENT I

A POST-TAKING ZONING DECISION MAY BE CONSIDERED IN DETERMINING THE VALUE OF CONDEMNED PROPERTY AT THE TIME OF THE TAKING.

A. Michigan Court Rules Define Relevance Broadly.

Relevance is defined in Michigan Rule of Evidence 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. This definition is very broad and sets a low standard for the admissibility of evidence. *People v Vandervliet*, 444 Mich 52, 60-62; 508 NW2d 114 (1993). All relevant evidence is admissible unless it falls within an exception. MRE 402. Relevance is not an inherent characteristic of evidence; it is based on a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make is more or less probable than it would be without the evidence. *People v Crawford*, 458 Mich 376, 387-390; 582 NW2d 785 (1998). To determine relevancy, the court must identify the material fact at issue and determine whether the evidence tends to make it more or less probable. The relevance of proffered evidence must be measured against the constitutional definition of just compensation. Whether post-taking zoning decisions may be considered depends on whether they are relevant to a determination of value at the time of the taking.

B. Relevance Must Be Determined By Evaluating Whether The Evidence Makes A Particular Value At The Time Of Taking More Or Less Probable So That The Property Owner Receives Just Compensation.

The Michigan Constitution requires a condemning authority to pay "just compensation" when it takes private property for public use. Const 1963, art 10, § 2. The meaning of "just compensation" is derived from and controlled by the constitutional text. The term must therefore be understood in light of the rule of common understanding. *Federated Publications, Inc v*

Michigan State University Board of Trustees, 460 Mich 75, 84; 594 NW2d 491 (1999).[14] This Court has also taught that it is appropriate to consider "the circumstances surrounding the adoption of the provision and the purpose it is designed to accomplish. *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). If the text includes a technical, legal term then the court is to rely on the understanding of the term by those sophisticated in the law at the time of the constitutional drafting and ratification. *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003). See also *Michigan Coalition of State Employee Unions v Civil Service Comm'n*, 465 Mich 212, 222; 634 NW2d 692 (2001). Just compensation falls within a "class of words that are freighted with historic meaning." *Id.* at 376. When analyzing its meaning, this Court must look to the decisional authority and other guidance available to those sophisticated in the law at the time. *Id.* "[L]ongstanding legal practice and custom, as revealed through countless judicial opinions over the centuries" guides the Court in determining the meaning of just compensation in any given circumstance. *Id.* at 376 n 10.

In line with these principles of constitutional interpretation, "just compensation" requires payment that places the property owner in the same position he would have been in had the taking not occurred. *State Highway Comm v Eilender, supra*. For many years, Michigan courts have held "[n]othing can be fairly termed just compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred." *In re Widening of Bagley Avenue*, 248 Mich 1, 5; 226 NW 688 (1929). Generally, a condemnation award is based

---

[14]This Court has embraced Justice Cooley's explanation of this principle:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it. [*Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) citing Cooley, Constitutional Limitations (6th ed), p 81.]

on fair market value of the property at the time of the taking. *In re Edward J Jeffries Homes Housing Project*, 306 Mich 638; 11 NW2d 272 (1943). The market value formula is intended to provide a measure that coincides with the value that the property owner would have retained had the property not been condemned. Michigan courts have emphasized that evidence regarding value should be liberally received. *In re Memorial Site, City of Detroit v Cristy*, 316 Mich 215, 220; 25 NW2d 174 (1946). The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon the consideration of all relevant facts in a particular case. *In re Widening of Bagley Avenue*, 248 Mich at 3. This Court has recently underscored the breadth of the analysis, which "takes into account all factors relevant to market value." *Silver Creek*, 468 Mich at 379. According to the Court, the "rule by which compensation shall be measured is not the same in all cases, but is largely affected by the circumstances." *Id.* at 377. Any evidence that tends to affect the market value of the property as of the date of the condemnation is relevant. 468 Mich 379 n 14 citing *Dep't of Transportation v Van Elslander*, 460 Mich at 129.

Michigan courts, like the federal courts, include in the value of land "every... element entering into its cash or market value, as tested by its capacity for any and all uses...." *Searl v Lake County School Dist*, 10 S Ct 374; 33 L Ed 740 (1890) quoted with approval in *Silver Creek*, 468 Mich at 377. The jury is entitled to consider facts relating to the highest and best possible use of the property because those facts help the jury to determine the full value, which must be based on both current and prospective uses of the property. *Jack Loeks Theatres, Inc v City of Kentwood*, 189 Mich App 603, 618-619; 474 NW2d 140 (1991) modified on other grounds 439 Mich 968 (1992). Otherwise, a property owner would be significantly under-compensated for the property because its value as used is often less than its value at its highest and best use. Post-taking zoning decisions may be relevant to the jury's determination of just compensation.

C. Evidence Of Post-Taking Zoning Decisions Is Relevant Because It Bears Upon The Value At The Time Of Taking.

Value is based on a forward-looking analysis of the property's use. Knowledgeable buyers of commercial real estate often look for property that is zoned for other lesser uses, such as agriculture or large-lot residential. This property is likely to be upzoned, thus enhancing its value and allowing commercial development to take place without some of the complexities of clearing and assembling vacant property that might occur in an area already zoned and developed for commercial use. This market-place reality means that value at any given time is based upon the present market analysis of the likelihood of future zoning and development. At the same time, value may be less because down-zoning is anticipated.

The relevance of evidence of a post-taking zoning decision must be measured by asking if the post-taking zoning makes it more likely that a reasonable possibility of a rezoning existed and thus affected the value. The jury may test the reasonableness of any expectation of a change in zoning by looking at events which occurred after the valuation. Had the property owner's effort to rezone been rejected by the City of Novi after the taking but before trial, MDOT most certainly would have sought to introduce that evidence to corroborate its contention that there was no reasonable possibility of a change. Michigan has traditionally recognized these market realities and allowed the parties to present such evidence. The trial court properly exercised its discretion to admit evidence of post-taking zoning decisions because it was probative of value at the time of taking. As long as there is a reasonable possibility that rezoning will take place and the evidence is confined to its proper use, it should be admitted. *Van Elslander*, 460 Mich at 129; *State Highway Comm v Eilender*, 362 Mich at 699.

This rule makes sense in light of Michigan's constitution, which requires "just" compensation, that is, that the property owner receives the value as of the date of the taking. Michigan courts have throughout their history held that "a determination of 'just compensation'

requires the consideration of all the multiplicity of factors that go into making up value." *Silver Creek Drain Dist v Extrusions Division, Inc, supra.* Just compensation "in 1963 meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value." *Id.* at 442. Consistent with this, Michigan courts both before and after adoption of the 1963 constitution have allowed the jury to consider the effect a reasonable possibility of rezoning would have on the property's value. See e.g. *Eilender, supra*; *Van Elslander, supra.*

Other jurisdictions also consider evidence that the market value would have been enhanced or diminished by the reasonable possibility of a change in the zoning. See e.g. *Nashville Housing Authority v Cohen*, 541 SW2d 947, 950-953 (Tenn, 1976) ("a prospect of rezoning which may appear to be somewhat remote should nevertheless, be considered by the court if it affects the fair market value of the property on the date of taking"); *State Roads Comm of Maryland v Warriner*, 211 Md 480; 128 A2d 248 (1957). A property owner is entitled to base his valuation on a use established by evidence showing a reasonable probability of rezoning. *Lake County Forest Preserve Dist v The Bank & Trust Co of Arlington Heights*, 436 NE2d 237; 106 Ill App 856 (1982). See also *Unified Sewerage Agency of Washington County v Duyck*, 576 P2d 816; 33 Ore App 375 (1978). In *Duyck*, the property owner introduced evidence of a reasonable probability that the property would be annexed to a nearby city, a step that would increase its market value. 576 P2d at 819. The property owner's expert properly included this as a factor in estimating the value at the time of taking. *Id.* See also *Douglas Environmental Associates, Inc v Dep't of Environmental Protection*, 429 Mass 71; 706 NE2d 620, 623-624 (1999) (trier of fact should consider possible uses not yet approved with discounts for the likelihood of their being approved and for their futurity).

The Court of Appeals majority correctly held that evidence of a reasonable possibility of a change in zoning should be admitted. But it then created a new limit for such evidence artificially rejecting evidence of events that occur after the taking. This was error. How better to test the strength of a prediction than to ask whether it came true? If, as here, the employees and officers of a city openly discuss rezoning, its planner explains that change is desired, proposed changes to facilitate higher uses are discussed in public meetings by the city's legislative body, knowledgeable buyers will most certainly weigh this information in determining the value of the property. When the condemning authority insists that no reasonable possibility of rezoning existed, the strength of its assertion can be tested by a retrospective analysis. In other words, the fact that the zoning change actually occurred corroborates the property owner's claim that the existence of a reasonable possibility of imminent change increased the property's value.

The distinguished Nichols' treatise, Eminent Domain, puts it succinctly:

> The fact that, subsequent to the taking, the zoning ordinance was actually amended to permit the previously proscribed use has been held to be weighty evidence of the existence (at the time of the taking) of the fact that there was a reasonable probability of an imminent change.

4 Nichols, Eminent Domain (3d ed), § 12C.03[3]. Nichols is not alone in recognizing the importance of retrospective evidence.

The Uniform Standards of Professional Appraisal Practice defines a retrospective appraisal as one in which the effective date of the appraisal precedes the date of the appraisal report. USPAP, Standard 3, The Appraisal Foundation, 9/16/98. According to the Uniform Standards of Professional Appraisal, "[d]ata subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date." *Id.* The appraiser should "determine a logical cut-off because at some point distant from the effective date, the subsequent data will not reflect the relevant market." *Id.* These standards have been developed by the federal government and

are implemented by the states. See 12 USC § 3331 *et seq*. All state licensed realtors in Michigan are required to adhere to these standards. See MCL 339.2607; MCL 339.2615; MCL 339.2633.

Condemnation is not the only place in which the law allows for a retrospective analysis. In tax cases, for example, courts have said that it is permissible to test the reasonableness of an expectation by looking at events which occurred after the valuation date. See e.g., *Portage Silica Co v Comm'r of Internal Revenue*, 49 F2d 985, 987 (CA 6, 1931) (expert witness's testimony as it dealt with developments after the valuation date was "competent, at least, for whatever value they might have in determining the soundness of petitioner's presumption"); *TJ Coffey v Comm'r of Internal Revenue*, 14 TC 1410, 1419 (1950) (board is not obliged at a later date to close its mind to subsequent facts and circumstances demonstrating fair market value at the time); *Beck v Comm'r of Internal Revenue*, 15 TC 642 (1950) ("facts reasonably capable of being anticipated as of the valuation date may be used in corroborating the original valuation" although they cannot "be used as a basis for computing a new valuation to supplant the original based on facts then known"); *Estate of Lewis A Bailey v Comm'r of Internal Revenue*, TCM 2002-152; 2002 Tax Ct Memo LEXIS 159 (2002) (post-valuation date events "are usefully considered for the limited purpose of illuminating expectations that a hypothetical willing buyer and seller might have reasonably entertained as of the date" of valuation).

In *Estate of Lucretia Davis Jephson v Comm'r of Internal Revenue*, 81 TC 999; 1983 Tax Ct LEXIS 1 (1983), the court's analysis of post-valuation date events is instructive concerning the permissible boundaries and use of retrospective analysis. The taxpayer sought to strike the Commissioner's answer because it included events occurring after the valuation date. The tax court agreed that post-death events may not be considered in valuing estate assets. 81 TC at 1001. But the tax court explained that the Commissioner was not arguing that the post-death

liquidation should be considered in valuing the estate assets. *Id.* Instead, the Commissioner argued that the availability of a liquidation should be considered in valuing the estate and that the fact that "such a liquidation did subsequently take place... supports his contention regarding its availability." *Id.* at 1001-1002. While reiterating the rule that valuation was not to be judged by subsequent events, the tax court explained that these events were nevertheless appropriate evidence for consideration:

> There is, however, substantial importance in the reasonable expectations entertained on that date. Subsequent events may serve to establish both that the expectations were entertained and also that such expectations were reasonable and intelligent. Our consideration of them has been confined to that purpose. *Id.* at 1002. The tax court emphasized that it did not determine the value based on "what the value would have been had they been definitely known on" the valuation date. *Id.* Instead, the tax court considered facts "which had completely occurred, but also those which were in process and those which were reasonably in contemplation."

Id.

Like the commissioner, the property owner here argued at trial that the value of the property on the date of the taking must include consideration of the availability of rezoning to an office/high tech zoning classification. When met with arguments by the condemning authority that there was no reasonable possibility of a rezoning, the property owner was properly allowed to point to the post-taking zoning change to show that knowledgeable and willing buyers and sellers would have included this possibility in their calculation of value. Like the commissioner, the property owner could point to the fact of the rezoning to establish that the expectation of a change in zoning was entertained and was reasonable. See also, *Estate of Gilford v Comm'r of Internal Revenue*, 88 TC 38, 52 (1987) (postmortem events can be considered by the commissioner for the limited purpose of establishing what the willing buyer and seller's expectations were on the valuation date and whether these expectations were reasonable and intelligent).

Courts have often allowed use of sales subsequent to the date of taking, another form of permissible retrospective analysis. *Hance v State Roads Comm of Maryland*, 221 Md 164, 173-176; 156 A2d 644 (1959) (courts generally make no distinction between sales occurring prior to taking and sales consummated after the date when title has vested in the condemning authority); *State of Hawaii v Heirs of Halemano Kapahi*, 48 Hawaii 101, 111; 395 P2d 932 (1964) ("evidence of commerce in land after the date of condemnation has been held competent and admissible as bearing on the value of the condemned land at the time of the taking"). As a general rule, "sales occurring after the date of taking can be used to show the subject property in the before situation.[15] *City of Tucson v Ruelas*, 508 P2d 1174; 19 Ariz App 530 (1973). See also *Virgin Islands Housing Authority v 15.5521 U.S. Acres of Land in St. Croix, Virgin Islands*, 230 F Supp 845 (VI Dist, 1964); *United States v 63.04 Acres of Land*, 245 F2d 140, 144 (CA 2, 1957). Thus, appraisers consider post-valuation sales to confirm trends that would have been considered by a buyer or seller as of the effective date of an appraisal. For example, *In re ANR Pipeline*, 276 Kan 702; 79 P3d 751 (2003), the court discussed the Uniform Standards of Professional Appraisal, which contemplate the use of retrospective analysis:

> In addition, in K.S.A. 79-506, the legislature specifically adopted the Uniform Standards of Professional Appraisal Practice issued by the Appraisal Standards Board in effect on March 1, 1992. The amicus curiae points out that Appraisal Standard No. 3, adopted by the legislature, acknowledges that retrospective appraisals may be appropriate for property tax matters and permits appraisers to consider data subsequent to the effective date of appraisal to confirm trends which would have been considered by a buyer or seller as of the effective date in arriving at a retrospective value. [*Id.*]

Similarly, retrospective analysis has been allowed to evaluate whether a liquidated damages clause amounts to an impermissible penalty clause. E. Allan Farnsworth, Contracts,

---

[15] "It is also the general rule that comparable sales which reflect an enhanced value brought by the making of the improvement are not admissible." *Ruelas*, *supra.*

§ 12.18, pp 841-850 (1999). For example, a Tennessee appellate court used retrospective analysis to conclude that "wide disparity between the stipulated damage amount and actual damages may indicate that a damage forecast was unreasonable". The comparison between the actual damages and those stipulated was allowed to provide an indication that the expectations of the parties were, or were not, reasonable. The Wisconsin Supreme Court applied this prospective-retrospective approach to test the reasonableness of a liquidated damages clause. *Wassenaar v Panos*, 111 Wis 2d 518; 331 NW2d 357 (1983). The *Wassenaar* court explained that in determining what was reasonable at the time of contracting, facts available at trial could be considered. *Id.*

In determining value on the date of taking, Michigan has traditionally allowed the reasonable possibility of rezoning or of a variance to be weighed by the factfinder to determine the price that a willing buyer would have offered for the property just prior to the taking. *Van Elslander*, 460 Mich at 129; *Eilender*, 362 Mich at 699. In *Van Elslander*, this Court explained that the factfinder should be permitted to weigh evidence suggesting that the possibility of rezoning or of a variance would have affected the price which a willing buyer would have offered for the property. 460 Mich at 130-131 citing *Eilender*, 362 Mich at 699. Evidence of subsequent rezoning is one form of proof that an appraiser may rely on to show a change that would have affected value:

> The type of evidence which has been admitted as material as tending to prove a reasonable probability of change includes the granting of many variances which showed a continuing trend that will render rezoning probable, the actual amendment of the ordinance subsequent to the taking, and an ordinance rezoning neighboring property. Opinions based upon such facts are also admissible.

Bembinster v State Dep't of Highways & Transportation, 57 Wis 2d 277, 284-285; 203 NW2d 897 (1973). The Court of Appeals majority erred in rejecting such evidence.

The record in this case shows an appropriate use of retrospective analysis to establish value on the date of the taking. (Tr, 4/6/01, Fuller, pp 38-39; Apx 421a). In 1995, before the date of the taking at issue here, Fuller was asked by an Oakland County Circuit Court to act as an independent neutral expert and review appraisals submitted to the court in connection with the valuation of a nearby property. (*Id.*, pp 43-44; Apx 422a). The Brainard property that Fuller was assisting the court to evaluate was located on the northwest corner of Twelve Mile Road and Haggerty. (*Id.*, p 45; Apx 423a). As part of his analysis of that five-acre parcel, Fuller stopped by the City of Novi and spoke with Greg Capote, a planner for the City. (*Id.*, pp 43-44; Apx 422a). Capote told Fuller that the City's goal was to create a zoning district that would allow for some kind of new development in the high-tech office area. (*Id.*, p 44; Apx 422a). Capote "pointed at the subject property that's the subject of this appraisal [the appraisal Fuller presented in this lawsuit] and this trial at that time" to explain that the City was "trying to establish some kind of high-tech district for these areas that we would like to see developed in that manner." (*Id.*, p 44; Apx 422a). According to Fuller, Capote told him that he was not sure what would happen to the Brainard parcel, but "you should know that this is what's happening to the piece to the north, that we're working toward changing the zoning there, and that would probably affect the Brainard piece." (*Id.*, p 45; Apx 423a). This "piece to the north" is the property at issue in this lawsuit. Thus, Fuller had a strong basis for believing the zoning would be changed long before he was retained to appraise the property at issue here in connection with this litigation.

Fuller's analysis was strengthened by his feasibility analysis. (*Id.*, pp 46-63; Apx 423a-427a). Fuller determined that it was not feasible to develop the property as it was zoned. (*Id.*, pp 62-63; Apx 427a). Because single family residential was not feasible, Fuller considered high-tech office to be the highest and best use. (Tr, 4/6/01, Fuller, p 64; Apx 427a). Fuller explained

that he reduced the value he assigned because the property had not been rezoned as of the date of the taking. (*Id.*, p 158; Apx 451a).

The record contained abundant evidence of a reasonable possibility of rezoning. As early as 1992 or 1993, the City of Novi's then-mayor, Matthew Quinn, told the property owner and a National Bank of Detroit representative that the City would be willing to rezone part of the property for an office campus to house NBD's headquarters. (Tr, 4/5/01, Quinn, pp 11-12; Apx 342a). The city manager agreed that the City would consider a zoning change. (Tr, 4/5/01, Kriewall, pp 27, 31; Apx 346a, 347a; Tr, 4/5/01, Sosin, pp 72-73; Apx 357a). Zoning to permit nonresidential office and technology developments was not only a reasonable possibility. It was likely. Efforts were underway to change the zoning to facilitate such development. (Tr, 4/5/01, Kriewall, pp 30, 46; Apx 347a, 351a; Tr, 4/5/01, Capote, pp 262-266; Apx 405a-406a; Tr, 4/6/01, Fuller, pp 51-52, 65; Apx 424a, 428aa; Tr 4/5/01, Quinn, p 13; Apx 343a). In fact, six months before the taking (in June 1995), the Planning Commission considered adopting a new zoning classification, OS-3, which was "essentially the same" as the office/service/technology (OST) classification later adopted. (Tr, 4/6/01, Fuller, p 44; Apx 422a; Tr, 4/5/01, Capote, p 267; Apx 406a). A report issued around this time (four months before the taking), also demonstrated the realistic possibility of an imminent change to the zoning laws. (Tr 4/5/01, Kriewall, p 30; Apx 347a). It was "intended to portray that Novi really needed to move more into the direction of nonresidential development" in order to relieve the tax burden on homeowners. (Tr 4/5/01, Kriewall, p 30; Apx 347a).

According to the Court of Appeals, a major issue for the jury was whether the property owner's appraisal of the property using a non-residential "highest and best use" was too speculative. (Court of Appeals Opinion, p 2; Apx 545a). If, at the time of condemnation, there was no reasonable possibility of a zoning change, then the jury should not have considered the

property owner's appraisal, which presented a valuation based on commercial development. (*Id.*) MDOT offered proofs intended to suggest that there was no possibility of a rezoning of the property. For example, Rogers insisted that there was "no chance" that he would have recommended rezoning the property. (Tr 4/2/01, Rogers, p 193; Apx 236a). Similarly, Doozan submitted a report that there was no possibility that the City could waiver from the residential zoning of the property. (Tr 4/2/01, Doozan, p 222; Apx 395a).

Contrary to Rogers' and Doozan's testimony, the office/service/technical zoning district was adopted in 1996. The property's rezoning to this new district was discussed in meetings regarding the new classification and it was rezoned in April, 1998. (*Id.*) The evidence of the later-enacted zoning change was therefore important corroborating evidence, intended to illuminate for the jury the expectations that a willing buyer or seller might reasonably have entertained as of the date of the taking. The evidence was not an effort to engage in hindsight evaluation. Instead, it demonstrated the strength of the prophecy that formed the basis for allowing consideration of the highest and best use even when that use could only be effectuated with a zoning change.

Value was based on the prophecy of a zoning change to permit high-tech office development on the property. Any market participant in Novi during the 1990s, and even earlier, would have seen strong indications that zoning changes were imminent. MDOT's witness, Rogers, agreed that the City had been pursuing changes to increase high-tech office development for approximately eight years before the property was rezoned. (Tr, 4/2/01, Rogers, pp 181-183; Apx 233a). Rogers recalled working on OS-3, another zoning classification to allow for high-tech development. (*Id.*, p 195; Apx 236a). When OS-3 was not accepted by the Planning Commission, the City's planning director continued to pursue steps to implement zoning for high-tech office development. (Tr, 4/6/01, Fuller, pp 50-51; Apx 424a). Former Mayor Quinn

explained that the OS-3 zoning became the OST district. (Tr, 4/5/01, Quinn, pp 12-14; Apx 342a-343a). The process of creating the OST classification and identifying the property to include in a city-initiated rezoning began years before the taking. Although the culminating zoning changes took place after December 7, 1995, the jury was correctly allowed to hear the appraiser's retrospective analysis regarding the effect of this strongly-foreshadowed zoning change on the property's value.

Courts have found such evidence particularly useful when evaluating value in a non-liquid market. When, as here, a party insists that there was no reasonable possibility of rezoning, a theme presented consistently throughout trial and reiterated in closing argument (Tr, 4/9/01, pp 44-75; Apx 465a-473a), the opposing party is entitled to respond by showing that the zoning in fact changed. As Justice Cardozo explained, "Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp on its pages, and forbids us to look within." *Sinclair Refining Co v Jenkins Petroleum Process Co*, 289 US 689, 698; 53 S Ct 736; 66 L Ed 1448 (1933).

Fuller's testimony correctly valued the property based on a high-tech office-type development. (Tr, 4/6/04, Fuller, p 65; Apx 428a). He reduced the value to take into account the risk that the property might not be rezoned and the potential delay in any rezoning. (*Id.*, p 71; Apx 429a). Fuller did so despite his conclusion that in his thirty-two years of experience, "I've never been more confident that a property was going to be rezoned." (*Id.*, p 144; Apx 447a). Fuller's confidence was borne out by the later change in zoning, corroboration that was properly revealed to the jury. By failing to allow the jury to weigh evidence of post-taking zoning decisions, the Court of Appeals artificially constrains their consideration and deprives them of relevant evidence regarding the actual value of the property. The evidence corroborates the pre-

taking evidence showing the possibility, and here the high likelihood, that rezoning would occur, increasing the value of the property on the date of the taking. It was unquestionably relevant.

Typically such evidence is attacked, not because it is per se irrelevant as the Court of Appeals concluded in this case, but because the post-taking zoning decision occurred so long after the taking that it lends no support to the possibility of rezoning at the time. The property owner, the trial court, and the dissenting panelist all cited authorities for the proposition that two and one-half years is short enough for the evidence to have substantial probative value, particularly in the context of a large assemblage of desirable vacant property. E.g., *Vic Regnier Builders, Inc v Linwood School Dist No 1*, 189 Kan 360; 369 P2d 316, 319 (1962) (evidence "that it was reasonably probable the property would be rezoned for commercial use within three to five years"). Realistically, any potential developer of this kind of commercial property is operating on much longer time lines than most other categories of buyers. A knowledgeable buyer in the market for hundreds of acres of prime vacant land will be looking not merely at the parcel's current zoning, but at what uses are likely to be permitted when the buyer wants to begin development. This Court has noted that events occurring as long as ten to fifteen years after the taking may have to be considered for valuation purposes. *Pierson v H R Leonard Furniture Co*, 268 Mich 507, 522; 256 NW 529 (1934).

Other courts have agreed with prior Michigan decisions that evidence of subsequent rezoning is relevant and admissible, so long as it is used properly:

> We agree with the Appellate Division that an amendment of the ordinance which came into being after the date of taking should not be excluded solely because of the time sequence. But such evidence should be carefully confined to its proper role. It may serve only to support the reasonableness of the factual claim that on the date of taking the parties to a voluntary sale would have recognized and been influenced by the probability of an amendment in the near future in fixing the selling price.

State by State Highway Comm v Gorga, 26 NJ 113, 118; 138 A2d 833, 835 (1958). Another appellate court, relying on *Gorga*, agreed that post-taking zoning decisions bear on the likelihood that a zoning restriction was likely to be lifted:

> It is common ground that the fact that a potential use is prohibited by the zoning law at the time of the taking does not prevent its consideration as an element of value "if there was then a reasonable prospect that the bar would soon be lifted." In deciding whether the proof has gone far enough to warrant consideration of such a use, "the judge has a margin of ultimate discretion." . . . [citations omitted]. Actual amendment of the zoning law, subsequent to the taking, may be "weighty evidence" of such a prospect. [citing Nichols treatise, discussed *supra,* then quoting *Gorga*, as above].
>
> * * *
>
> . . . [I]f the disputed evidence bore on the likelihood that a private developer could have obtained the rezoning, we think the judge could in his discretion admit it for that limited purpose, even though the actual rezoning was in some sense due to the project which was the basis for the taking.

Roach v Newton Redevelopment Authority, 381 Mass 135, 136-139; 407 NE2d 1251, 1253-1254; 381 Mass 135 (1980).

Subsequent rezoning is not always a one-way street favoring the landowner. Such evidence has been admitted on behalf of the condemning authority to show depreciation in value. See *United States v 765.56 Acres of Land*, 164 F Supp 942, 947 (ED NY, 1958), *aff'd United States v Glanat Realty Corp*, 276 F2d 264 (CA 2, 1960); *Reindollar v Kaiser*, 195 Md 314; 73 A2d 493 (1950). Here too, it is admitted because it is relevant evidence that the jury should weigh in considering the market value of the property at the time of the taking.

The national consensus is that post-taking zoning decisions are relevant evidence. The most widely-read and well-respected treatise on eminent domain law explains that it provides strong support for the proposition that the zoning was likely to change, thus increasing (or decreasing) the value. Michigan courts have traditionally allowed the jury to consider evidence regarding the reasonable possibility of a change that bears on value. The Court of Appeals erred

in ignoring this history, controlling Michigan precedent, and persuasive authority, to hold evidence of a post-taking zoning decision irrelevant. (Court of Appeals slip op, p 3; Apx 546a). A reversal is therefore required.

ISSUE II

THE COURT OF APPEALS ERRED BECAUSE *DEP'T OF TRANSPORTATION v VAN ELSLANDER* REQUIRED IT TO DEFER TO THE TRIAL COURT'S RULING ADMITTING EVIDENCE OF A REASONABLE POSSIBILITY OF REZONING WHERE SUCH EVIDENCE WAS RELEVANT TO THE VALUE ON THE DATE OF THE TAKING AND, IN ANY EVENT, ANY ERROR WAS NOT INCONSISTENT WITH SUBSTANTIAL JUSTICE.

A. The Abuse Of Discretion Standard Requires Reversal.

Michigan courts have taught that an abuse of discretion requires more than a difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). In the oft-quoted *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), this Court warned:

> an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather passion or bias.

Id. Deference to trial court evidentiary rulings stems from the notion that the trial bench is best-situated to exercise judgment concerning the matter. See generally, Steven Alan Childress & Martha S Davis, 1 Federal Standards of Review (1999), § 4.01, pp 4-2-4-4 . More recently, this Court reiterated its traditional approach and cautioned appellate courts not to substitute their judgment for the trial court in matters falling within their discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219; 600 NW2d 638 (1999). This deferential standard, when applied here, as is required by *Van Elslander*, 460 Mich at 129, requires a reversal and reinstatement of the trial court judgment in favor of the property owner.

The parties and the Court of Appeals agree that appellate review of a decision admitting or excluding evidence is for an abuse of discretion. *Dep't of Transportation v Van Elslander*, 460 Mich 127, 128-129; 594 NW2d 841 (1999). This standard significantly limits the Court of Appeals' power to reverse. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-229; 600 NW2d 638 (1999) (appellate courts not to substitute their judgment in matters falling within the discretion of the trial court); accord *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94-95; 666 NW2d 623 (2003). This abuse-of-discretion standard undoubtedly applies in condemnation cases. *Wray v Stvartak*, 121 Ohio App 3d 462; 700 NE2d 347, 351 (1997) ("An abuse of discretion means more than a mere error of law or judgment; it implies an attitude on the part of the trial court that is arbitrary, capricious or unconscionable").

B. *Dep't of Transportation v Van Elslander* Teaches That It Is Not An Abuse Of Discretion To Admit Evidence Of A Reasonable Possibility Of Rezoning So That It Can Be Considered By The Factfinder In Determining The Value Of The Property.

Dep't of Transportation v Van Elslander was a per curiam opinion concurred in by all members of the Court. It arose out of MDOT's effort to condemn property for a road-widening project in Macomb County. This Court reversed a trial court's decision excluding evidence of a possible zoning variance as an abuse of discretion. *Van Elslander*, 460 Mich at 128-129. At trial, MDOT sought to introduce an appraisal of the defendants' property that was based on the possibility that the property owners could obtain a zoning variance to cure violations created by the condemnation. The condemnor's appraiser spoke to the city official. The trial court granted a motion to exclude this evidence, which was affirmed by the Court of Appeals over a dissent by Judge Bandstra. The case was appealed to the Supreme Court, which adopted the dissenting opinion and reversed the trial court's order.

The *Van Elslander* court interpreted just compensation to mean "the full monetary equivalent of the property taken." 460 Mich at 129. Broadly interpreting the threshold for

admitting relevant evidence, the Court held that "any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant." *Id.* at 130. Relying on *Eilender*, *supra*, the *Van Elslander* court announced that relevant evidence includes "evidence of the possibility of rezoning to the extent that 'the "possibility" would have affected the price which a willing buyer would have offered for the property just prior to the taking.'" *Id.* quoting *Eilender*, 362 Mich at 699.

The threshold for the admission of this type of evidence is whether a possibility is reasonable, rather than frivolous or purely speculative. *Id.* at 131 quoting *Eilender* at 700. The evidence at issue in *Van Elslander*, an appraisal report, was based upon the appraiser's opinion. In forming his opinion, the appraiser had conferred with employees of MDOT who had successfully obtained variances for numerous other properties within the same city. Based on this, the appraiser was able to predict that the variance would be issued. This was enough to make the appraisal and accompanying testimony admissible. The property owners could then present testimony or other evidence tending to show that the variance would not be granted. The scope of *Van Elslander's* holding is illuminated by the Court's rejection of two arguments presented by the property owners. *Eilender* could not be distinguished on the basis that it involved a rezoning rather than a variance or that the evidence was offered by the landowner rather than the state. *Id.* Those points of distinction were "considerations to be weighed by the factfinder in determining 'the price which a willing buyer would have offered for the property just prior to the taking' under *Eilender* regardless of whether the possibility of rezoning or the possibility of a variance is at issue." *Id.* at 130-131. This makes clear that the factfinder should hear and consider evidence that property value has been affected by the possibility of a rezoning or a variance, whether the evidence is offered on behalf of the condemning authority or the property owner.

C. Introduction Of Evidence Of Subsequent Rezoning Is Not An Abuse Of Discretion If Its Use Is Confined To Its Proper Role, As It Was Here.

The Court of Appeals majority erred in ruling that the trial court abused its discretion when it admitted evidence that the property was, in fact, rezoned in May 1998. (Court of Appeals slip op, p 3). The majority reasoned that evidence of the actual zoning change was "irrelevant to the value of the property on the date of taking and should not have been disclosed to the jury." (*Id.*) But the dissent pointed out that "evidence of the actual rezoning had the tendency to make the existence of the possibility of rezoning more probable than it would be without the evidence." (Court of Appeals slip op, dissent, p 2). The dissenting opinion also correctly emphasized the standard of review, reasoning that the trial court's decision could not have amounted to an abuse of discretion given the absence of prior case law regarding the admissibility of subsequent zoning decisions and the respected authority favoring the trial court's ruling. (*Id.*)

As in *Eilender* and *Van Elslander*, the possibility of a change in the City of Novi's zoning had been under serious consideration long before the date of the taking. The business community had prepared a report urging the City to increase land zoned for office/high-tech development. (Tr, 4/5/01, Kriewall, pp 28-30; Apx 346a-347a; Defendants Exhibit K; Apx 503a). City leaders supported a change in the zoning to allow office and high-tech development. (*Id.*) One city official, Greg Capote, had specifically pointed to this property as property suitable for a change to office/high-tech when discussing the likelihood of zoning changes in the area, long before MDOT initiated its condemnation proceedings. (Tr, 4/6/01, Fuller, pp 43-45). The property owner had met with the city manager and others to discuss changes in zoning. (Tr, 4/5/01, Sosin, pp 65-70; Apx 356a-357a; Tr, 4/5/01, Kriewall, pp 27, 31; Apx 346a, 347a; Tr, 4/5/01, Quinn, pp 11-12; Apx 342a). In fact, a new zoning classification OS-3 was presented to the planning commission for approval. After a tie vote, this proposed change was not pursued

further. Instead, a revised classification was developed and later adopted. (Tr, 4/5/01, Capote, pp 263-266; Apx 405a-406a; Kriewall, p 46; Apx 351a; Tr, 4/6/01, Fuller, pp 65, 160; Apx 428a, 451a). In sum, the record here shows a much stronger possibility of rezoning than that approved in *Eilender* and *Van Elslander*.

A review of the record reveals that the evidence shows more than the requisite-reasonable possibility of a change. It shows overwhelmingly that the R-A zoning was a holding classification that would change when utilities and other services were brought to the area (See e.g., Kriewall, Novi's former city manager, Tr, 4/5/01, p 27; Apx 346a; Sosin, the property owner, Tr, 4/5/01, p 70; Apx 357a; and even MDOT's witness, Brandon Rogers, Novi's former planning consultant, Tr, 4/2/01, p 148; Apx 224a; Ex YY at 28; Apx 521a). This overwhelming evidence demonstrated that the zoning change was inevitable and imminent. It was evidence of exactly the kind that buyers and sellers base their decisions on every day.

Such evidence was particularly appropriate because MDOT sought to bar use of the property owner's appraisals and to prevent the property owner from basing its valuation on development of the property as a high-tech office corporate park. (MDOT's Motion in Limine, 3/6/01; Apx 43a). MDOT insisted that there was "no tangible evidence that the Haggerty Partners' appraisers can point to that would cause a prospective buyer to pay office industrial prices for the subject property at approximately $157,000 per acre on the basis that there was a reasonable possibility that the property could have been rezoned on December 7, 1995." (*Id.*, p 18; Apx 60a). In opposition, the property owner emphasized that MDOT's position was "undercut by trends of the past decade in Novi and in neighboring communities, but even more significantly, it is contradicted by the actual change in zoning status of the Property within a relatively short period after the taking." (Defendants' Brief, p 3; Apx 72a). Novi formally noticed the proposal to rezone the property in January 1998, only twenty-five months after the

taking. (Tr, 4/2/01, Rogers, p 114; Apx 216a). The property owner pointed out that MDOT was, in effect, asking the court to hide from the jury significant evidence tending to disprove MDOT's contention that there was no reasonable possibility of rezoning. (Defendants' Brief, p 3; Apx 72a).

The trial court did not abuse its discretion when it resolved this debate by ruling that the evidence offered by the property owner's appraiser was relevant, not too remote in time, and that its value was more probative than prejudicial. (Opinion & Order, 3/29/01, p 5; Apx 146a). The trial court found that a "factual dispute exists as to whether rezoning was a 'reasonable possibility' at the time of the taking, along with other evidence to establish trends in the use of" the property. (*Id.*) Thus, the trial court allowed the evidence to be submitted to the jury for a factual determination. This ruling represented the trial court's sound exercise of discretion to place before the jury the appraisal evidence, the testimony concerning the likelihood of a zoning change, and the corroborating evidence that the zoning later was changed. The Court of Appeals' reversal is therefore inconsistent with *Van Elslander*.

Under MDOT's view of the law, which formed the basis for the reversal in this case, it would not matter if the rezoning process had begun twenty-five days after the taking—or twenty-five minutes—it would still have been an abuse of discretion to admit the evidence. MDOT sought instead to obtain rulings that the property owner's valuation could only be based on the residential zoning in effect at the time. Given the strong possibility of rezoning, this approach would have severely under-compensated the property owner. Of course, it is absurd to think that knowledgeable sellers and buyers of property for large-scale projects would not have recognized the likelihood of rezoning if it was mere days away from the time at which they were deciding on a price to offer. As the distance lengthens, the probative value may gradually weaken, but relevance—"any tendency" to make a fact of consequence more or less likely—is unaffected.

Two years is not a long time for buyers and sellers of large assemblages of prime real estate. The worth of the rezoning evidence is simply a matter of degree, and matters of degree are for the trier of fact to weigh. Thus, the trial court's ruling was not an abuse of discretion.

D. Even If This Court Concludes The Post-Taking Zoning Decision Should Have Been Excluded, MDOT Has Failed To Show That The Judgment Was Inconsistent With Substantial Justice.

Error in the admission or exclusion of evidence warrants relief only if the refusal to take some action appears inconsistent with substantial justice. *Craig v Oakwood Hospital*, __ Mich __; __ NW2d __ (2004) Supreme Court Nos. 121405, 121407-09, 121419, rel'd 7/23/04), pp 10-11. The Court of Appeals majority, while briefly discussing harmless error, speaks obliquely of unidentified evidence to which it thinks the jury was unlikely to have been "exposed," but for the decision to admit actual rezoning evidence. (Court of Appeals slip op, p 3; Apx 546a). Undoubtedly the majority means the jury view evidence. The jury learned of the rezoning from the jury view alone, rendering any error harmless under MCR 2.613(A). MDOT requested the jury view and so invited any putative error in permitting the jury to learn of the subsequent rezoning.

The jury viewed the property, including some 300,000 square feet of new office buildings. Ordinary civil juries are limited in how they can use "view" evidence, *Valenti v Mayer*, 301 Mich 551, 558; 4 NW2d 5 (1942); M Civ JI 3.12, but condemnation juries may view the premises as an aid in determining value. *In re Widening of Michigan Avenue*, 280 Mich 539, 547-548; 273 NW 798 (1937). This greater authority is traditionally given to juries in condemnation cases. *In re Memorial Hall Site, City of Detroit v Cristy, supra*; *Michigan Air Line Ry v Barnes*, 44 Mich 222, 225; 6 NW 651 (1880).

M Civ JI 90.22, read to this jury at MDOT's request, invited the jurors to make the logical inference from what they were seeing out the windows of the bus as they drove through the property owner's development:

> During the course of this trial, you were taken to the subject property. In addition to the testimony which you have heard and the exhibits which you have seen here in the courtroom, you may also consider what you saw when you visited the property if you believe the things you saw would be helpful to you in reaching a decision.

(Tr, 4/9/01, p 145; Apx 491a).[16]

Because MDOT requested the jury view, it is in no position to argue that a jury view was inappropriate in this case, whether requested by MDOT or the property owner. A party may not request action in the trial court and then argue on appeal that it was error for the trial court to grant the request. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964). See also *Phinney v Verbrugge*, 222 Mich App at 537 (error to which the aggrieved party contributed even by negligence is not reversible).

Thus, even when there has been error in the admission of evidence, a jury view can render it harmless:

> Nevertheless, the error in failing to strike this testimony was harmless. The jury had viewed the premises and its verdict was within the range of the testimony. Under these circumstances, the verdict will not be disturbed absent a clear showing that it was the product of passion or prejudice or was affected by palpable error. There was no showing that the jury's verdict in this case was the product of passion or prejudice or was affected by palpable error. *Dep't of Transportation v Hsueh*, 117 Ill App 3d 945, 948; 454 NE2d 360 (1983). [citation omitted].

---

[16]Contrast this instruction with M Civ JI 3.12:

> Your view of the [premises/scene/object] was intended to help you understand the evidence. You are not to consider as evidence anything you may have learned from the view which was not covered by the testimony *(and exhibits) received in evidence.

Testimony of the subsequent rezoning was merely cumulative of the jury view, which came first. Just as the erroneous exclusion of cumulative evidence is harmless, *In the Matter of Virginia Park (Goldberg v Detroit)*, 121 Mich App 153, 165; 328 NW2d 602 (1982), so too is the erroneous admission of cumulative evidence. MDOT failed to carry its burden of showing that the supposed error was prejudicial and that the failure to reverse would be inconsistent with substantial justice. *Henson v Veterans Cab Co*, 384 Mich 486, 494; 185 NW2d 383 (1971). In these circumstances, the trial court did not abuse its discretion.

Moreover, the jury view was far from the only evidence rendering this "error" harmless. As the Court of Appeals dissent points out, there was "other competent, admissible evidence that allowed the jury to properly conclude that rezoning was a reasonable possibility." (Court of Appeals slip op, dissent; Apx 544a). MRE 103(a); MCR 2.613(A). In the years preceding the taking (December 7, 1995) Novi was actively trying to move away from residential development towards large campus-type, high-tech corporate office park development. Neil Sosin, Greg Capote (Novi's Economic Development Coordinator in 1995), Matthew Quinn (Mayor of Novi in 1995), Edward Kriewall (City Manager of Novi in 1995), and others testified to pre-taking meetings and reports showing not only that it was reasonably likely the property would be rezoned, but that a competent developer interested in the Novi area would have realized it was likely.

Here, the rezoning was neither sought nor produced by MDOT. Rather, it was initiated by the City of Novi itself, supported by its planning staff and affected developers and landowners throughout the City, and not only in the project area. For years the City had recognized that it needed large projects to support its tax base, (Tr, 4/5/01, Kriewall, p 30; Apx 347a) and looked for large assemblages of land like Owner's property in which to initiate rezoning and control of development. (Tr. 4/2/01, Rogers, pp 181-183; Apx 233a). The Court of Appeals majority

completely omitted any discussion of this other evidence in its four-line discussion of harmless error. (Court of Appeals slip op, p3; Apx 546a).

More generally, and more importantly to Michigan's jurisprudence, trial judges should be free to decide the evidentiary issue presented here in exactly the way this veteran trial judge did—by determining whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. Once made, this evidentiary decision is reviewable only for a true abuse of discretion, and is not to be reversed merely because the majority of an appellate panel might have reached a different conclusion. The Court of Appeals exceeded its review power by substituting its judgment for the trial court's. It merely paid lip service to the review standard so clearly established by this Court. This Court should make clear to MDOT and the Court of Appeals that the review standard means what it says, and reverse the majority's decision and affirm the trial court.

The jury instructions in this case "repeatedly stressed the principle that the jury must value the property as of the date of the condemnation, rather than at some future date." (Tr, 4/9/01, p 138; Apx 489a). The jury was correctly charged that:

> [I]f there was a reasonable possibility, absent the threat of this condemnation case, that the zoning classification would have been changed, you should consider this possibility in arriving at the value of the property on the date of taking.

(*Id.*, pp 139-140; Apx 489a). The majority agrees that this was an appropriate instruction, as does MDOT. In light of the instructions, the trial court could not have abused its discretion by admitting relevant evidence on the issue whether rezoning was reasonably possible as of December 7, 1995, the date of taking. The rezoning in 1998 was just such relevant evidence. It was not an abuse of discretion to allow it into evidence. Thus, a reversal is required.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will afford defendants-appellants' counsel the opportunity to address any questions that the Court may have concerning any complexities of the lower court record and the specifics of the parties' respective positions on appeal. Counsels' participation in oral argument will enable them to succinctly place their positions before this Court. It is defendants-appellants' belief that oral argument is necessary and will benefit all involved and that the decisional process will be significantly aided by this Court's allowance of oral argument.

See generally, Chief Judge Merritt's comments in *Judges on Judging: The Decision Making Process in the Federal Courts of Appeals*, 51 Ohio St L J 1385, 1386 (1990), wherein he stated, "At its core, the adversary process is oral argument."

RELIEF

WHEREFORE, Defendants-Appellants respectfully request that this Court reverse the Court of Appeals and reinstate the lower court judgment in favor of Haggerty Corridor Partners Limited Partnership, Paul D. Yager, Trustee a/k/a Paul D. Yeger and Neil J. Sosin and grant them such other relief as is warranted in law and equity.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: _____

MARY MASSARON ROSS (P43885)
Appellate Counsel for Defendants-Appellants
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

_____

ACKERMAN & ACKERMAN, P.C.
ALAN T. ACKERMAN (P10025)
DARIUS W. DYNKOWSKI (P52382)
Attorneys for Defendants-Appellants
5700 Crooks Road, Suite 405
Troy, MI 48098
(248) 537-1155

BRIAN G. SHANNON (P23054)
MARK P. KRYSINSKI (P35630)
JAFFE, RAITT, HEUER & WEISS, P.C.
Co-counsel for Defendants-Appellants
One Woodward Avenue, Suite 2400
Detroit, MI 48226-3418
(313) 961-8380

DATED: August 26, 2004